SINGAPORE REPORTS

Teo Soh Lung v The Minister Of Home Affairs & Ors

HIGH COURT (SINGAPORE) – ORIGINATING MOTION NO 46 OF 1988
LAI KEW CHAI J
2 AUGUST 1988

Administrative Law – Detention without warrant – Suspension order – Re-arrest upon issue of joint statement denying offence – Writ of habeas corpus ad subjiciendum – Whether detention and re-arrest illegal or improper – Judicial review – Internal Security Act (Cap 143, 1985 Ed), ss 8(1), 10 & 11 – Interpretation Act (Cap 1, 1985 Ed), s 45

Preventive Detention – Detention without warrant – Suspension order – Re-arrest upon issue of joint statement denying offence – Writ of habeas corpus ad subjiciendum – Whether detention and re-arrest illegal or improper – Internal Security Act (Cap 143, 1985 Ed), ss 8(1), 10 & 11.

The applicant was arrested on 21 May 1987 and interrogated. On 19 June 1987, the Minister of Home Affairs made a detention order under s 8(1)(a) of the Internal Security Act (Cap 143, 1985 Ed) ('the Act'), directing that she be detained for one year with effect from 20 June 1987. She applied for a writ of habeas corpus ad subjiciendum, raising questions about the construction of ss 8 and 10 of the Act and the precise basis, nature and extent of judicial review in cases of preventive detention which deeply concerned the security of the state and the liberty of the subject. The grounds for the detention order and the allegations of fact on which the order was based were duly stated.

The applicant had on 15 August 1987 in her written representations to the advisory board denied all complicity in the Marxist plot, protested her innocence, claimed that she was legitimately exercising her civil and political rights and she expressed her belief that her arrest and detention 'might be intended to prevent (her) from participating in politics'. As for her links with one Paul Lim Huat Chye, who is a key figure in the Marxist conspiracy, the applicant told the advisory board in August 1987 that on the third day of her arrest she had in a written statement to ISD admitted that in 1984 she had called for a tea gathering at her office and that Paul Lim Huat Chye at that meeting had suggested that the applicant and her friends help the Worker's Party, a political party in opposition to the party in government.

However, in later paragraphs of her representations the applicant went on to state, if not she certainly implied, that her written admission about Paul Lim Huat Chye's initiative was either mistaken or that it was made as a result of repeated suggestions by ISD officers in the course and at the end of what she claimed to be an oppressive interrogation. She then concluded by asserting that, at any rate, Paul Lim Huat Chye had no influence over her.

On 26 September 1987, the Minister directed under s 10 of the Act that the operation of the detention order should be immediately suspended as the government was satisfied that the applicant was 'unlikely to resume subversive activities and no longer posed a security threat'. The applicant executed a bond and had to comply with certain conditions against travelling and being involved with certain organizations as described. On 18 April 1988, the applicant and eight former detainees issued a joint press statement denying that they had been involved in a Marxist conspiracy. They also alleged that they were assaulted and oppressively treated during their interrogation. On the following day, the Minister in exercise of his powers under s 10 of the Act revoked the suspension direction dated 26 September 1987 with immediate effect and the applicant was re-arrested. The Minister had stated that 'it was necessary in the public interest' that the suspension direction be revoked. There was no suggestion that the applicant had breached any of the conditions attached to the suspension direction. On 18 June 1988, the applicant's original detention was extended for one year from that day under s 8(2) of the Act.

Held, dismissing the application: (1) A matter is justiciable in a court of law if it is within its jurisdiction or function to make a decision or a number of decisions upon the matter properly before it. Of foremost importance are the terms of the statutory provisions such as ss 8 and 10 of the Act, the constitutional validity of which is not challenged. They are part of the constitutional foundation upon which our country has been and is to be governed and a clear definition of the ambit of executive discretionary powers and the scope of judicial powers is vitally necessary. Two elements underlie the concept of justiciability, ie the nature of the decision and the fundamental basis and nature of the function of a court of law in habeas corpus proceedings or judicial review.

(2) A correct perception of the true basis and nature of judicial review will ensure that a court of law will properly keep within the limits of judicial review over a decision-making process to ensure that there has been no unlawfulness in the decision-making process and will also prevent a court from becoming an appellate court and thereby wrongly deciding whether a decision is right or wrong or in either affirming or substituting its decision for the decision of the authority vested with the discretionary power.

(3) Judicial review is concerned with the legality of any aspect or any decision made in the exercise of executive discretionary powers. In looking at any such aspect or any such decision, courts do not look at the merits of the decision. They do not ask whether the decision is 'right or wrong' because that decision has been entrusted to another authority. In a judicial review, courts should only ask whether a decision made in the exercise of an executive discretionary power is 'lawful or unlawful'.

(4) In the absence of abuse of power or irrationality, which has to be proved, courts have always recognized the common sense limitation as to what is justiciable and will accept the executive's assessment as to any national security requirement.

(5) The conditions of imprisonment complied with the detention rules and the nature and conditions of imprisonment had not fallen below minimum standards.

[*Editorial Note:* The applicant appealed to the Court of Appeal vide Civil Appeal No 81 of 1988. The court (comprising Wee Chong Jin CJ, Thean and Chan Sek Keong JJ) heard the appeal on 26-29 September 1988 and judgment was reserved.]

Cases referred to

1 *Liversidge* v *Anderson* [1942] AC 206 (folld)
2 *R* v *Inland Revenue Commissioner, ex p Rossminster Ltd* [1980] AC 952 (refd)
3 *R* v *Home Secretary, ex p Khawaja* [1984] AC 74 (distd)
4 *R* v *Home Secretary, ex p Bugdaycay* [1987] AC 514 (refd)
5 *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 (refd)

6 *Theresa Lim Chin Chin & Ors* v *Inspector General of Police* [1988] 1 MLJ 293 (refd)
7 *Lee Mau Seng* v *Minister for Home Affairs, Singapore & Anor* [1971] 2 MLJ 137 (refd)
8 *Minister of Home Affairs* v *Austin* [1987] LRC (Const) 567 (refd)
9 *Hurley & Anor* v *Minister of Law & Order* 1985(4) SA 709 (D) (refd)
10 *Katofa* v *Administrator-General for South West Africa & Anor* 1985(4) SA 211 (SWA) (distd)
11 *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014 (refd)
12 *Council of Civil Service Unions & Ors* v *Minister for the Civil Service* [1985] AC 374 (folld)
13 *R* v *Home Secretary, ex p Ruddock* [1987] 2 All ER 518 (folld)
14 *Greene* v *Secretary of State for Home Affairs* [1942] AC 284 (HL) (folld)
15 *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 (refd)
16 *Re Choo Jee Jeng* [1959] MLJ 217 (refd)
17 *Re Ong Yew Teck* [1960] MLJ 67 (refd)
18 *Kevin Desmond De Souza & Ors* v *Minister of Home Affairs & Ors* [1988] 2 MLJ 493 (folld)
19 *Middleweek* v *Chief Constable of Merseyside* The Times, 1 August 1985 (refd)
20 *R* v *Secretary of State for the Home Department, ex p Herbage (No 2)* [1987] 2 WLR 226 (refd)

Legislation referred to
Constitution of the Republic of Singapore arts 21(1), 149 & 151
Internal Security Act (Cap 143, 1985 Ed) ss 8, 10 & 11
Rules of the Supreme Court 1970 O 54

Anthony Paul Lester QC (*Ms Roslina Baba* with him) for the applicant.
S Tiwari, Soh Tze Bian and *Ms Joyce Huen* for the respondents.

Cur Adv Vult

Lai Kew Chai J: This application for a writ of habeas corpus ad subjiciendum by Teo Soh Lung, who is detained under the Internal Security Act (Cap 143, 1985 Ed) ('the Act'), raises questions about the construction of ss 8 and 10 of the Act and about the precise basis, nature and extent of judicial review in cases of preventive detention which deeply concern the security of the state and the liberty of the subject.

For the purposes of examining the proper construction of ss 8 and 10 of the Act and the extensive case law, I need only give a brief introduction of the relevant facts. I shall have to return to the facts in greater detail since such a recall is necessitated by the submissions of counsel for the applicant. In May 1987 the Internal Security Department ('the ISD') of the government launched a security operation. One of those arrested was the applicant. She was arrested on 21 May 1987 and interrogated. On 19 June 1987, the Minister of Home Affairs ('the Minister') made a detention order pursuant to powers contained in s 8(1)(a) of the Act. The Minister directed that she be detained for one year with effect from 20 June 1987.

Section 8(1)(a), so far as is material, provides:

> (1) If the President is satisfied with respect to anyperson that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof ..., it is necessary to do so, the Minister shall make an order –
> (a) directing that such person be detained for any period not exceeding two years; ...

It is relevant to refer to the constitutional provision as to how the President shall act. The relevant parts of art 21(1) of our Constitution read as follows:

> In the exercise of his functions under this Constitution or any law, the President shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, ...

In effect, therefore, the discretionary powers of ordering a detention is vested in the Cabinet.

Every person detained under the Act is entitled to make representations against a detention order to an advisory board constituted under the Act. Section 11(2) of the Act, so far as is material, reads:

> (2) For the purpose of enabling a person to make representations under subsection (1) he shall, within 14 days of the service on him of the order –
> (a) be informed of his right to make representations to an advisory board ... and
> (b) be furnished by the Minister with a statement in writing
> (i) of the grounds on which the order is made;
> (ii) of the allegations of fact on which the order is based; and
> (iii) of such other particulars, if any, as he may in the opinion of the Minister reasonably require in order to make his representations against the order to the advisory board.

The grounds on which the detention order of the applicant was made stated that:

> Between 1984 and May 1987, you acted in a manner prejudicial to the security of Singapore by being involved in a Marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a Marxist state.

The allegations of fact on which the detention order of the applicant was based were:

> (1) That you facilitated the infiltration of the Workers' Party in 1984 by a group of Marxists after discussions with Paul Lim Huat Chye, Tan Wah Piow's fellow Marxist, and other activists. You also actively assisted them in their efforts to make use of the Workers' Party as a vehicle to further the Marxist cause.
>
> (2) That you and Tang Fong Har made use of the Law Society of Singapore as a political pressure group at the suggestion of Paul Lim Huat Chye.

On 15 August 1987, the applicant submitted written representations to the advisory board. They were lengthy. She denied all complicity in the Marxist plot, protested her innocence, claimed that she was legitimately exercising her civil and political rights and she expressed

her belief that her arrest and detention '(might) be intended to prevent (her) from participating in politics'. As for her links with one Paul Lim Huat Chye, who is a key figure in the Marxist conspiracy, the applicant told the advisory board in August 1987 that on the third day of her arrest she had in a written statement to ISD admitted that in 1984 she had called for a tea gathering at her office and that Paul Lim Huat Chye at that meeting had suggested that the applicant and her friends help the Workers' Party, a political party in opposition to the party in government. However, in later paragraphs of her representations the applicant went on to state, if not she certainly implied, that her written admission about Paul Lim Huat Chye's initiative was either mistaken or that it was made as a result of repeated suggestions by ISD officers in the course of and at the end of what she claimed to be an oppressive interrogation. She then concluded by asserting that, at any rate, Paul Lim Huat Chye had no influence over her.

I should also refer to her allegations that she was slapped and threatened in the first three days of her arrest. On 21 April this year, a police report was lodged about these complaints. These complaints are not relevant for the purposes of these proceedings.

On 26 September 1987, the Minister in exercise of the powers contained in s 10 of the Act directed that the operation of the detention order should be immediately suspended. The government in a press release stated that it was satisfied that the applicant was 'unlikely to resume subversive activities and no longer posed a security threat'. The applicant executed a bond and had to comply with three conditions against travelling and being involved with certain organizations as described.

Section 10 of the Act, so far as is material, reads:

> At any time after an order has been made in respect of any person under s 8(1)(a) the Minister may direct that the operation of such order be suspended subject to the execution of a bond and to such conditions ... as the Minister sees fit.

On 18 April 1988, the applicant and eight other former detainees issued a joint press statement in which they denied that they had been involved in a Marxist conspiracy. They also alleged that they were assaulted and oppressively treated during their interrogation. On the following day the Minister in exercise of his powers under s 10 of the Act revoked the suspension direction dated 26 September 1987 with immediate effect and the applicant was re-arrested. Six other detainees were also re-arrested.

The relevant part of s 10 reads:

> ... and the Minister may revoke any such direction if he is satisfied that the person against whom the order was made has failed to observe any condition so imposed or that it is necessary in the public interest that such direction should be revoked.

The revocation of the Minister reads:

> The Internal Security Act
> (Cap 143)
>
> Revocation Under Section 10 Of Suspension Direction
>
> Whereas by an order made by the Minister for Home Affairs on 19 June 1987, under s 8(1)(a) of the Internal Security Act, Teo Soh Lung, NRIC No: 0008353-D of Blk 140, Jalan Bukit Merah, #22-1150, Singapore 0316, was detained for a period of one year, with effect from 20 June 1987:
>
> And whereas on 26 September 1987, the Minister for Home Affairs in exercise of the powers conferred on him by s 10 of the said Act directed that the operation of the said order be suspended, with effect from 26 September 1987, subject to the execution of a bond and compliance with certain conditions.
>
> And whereas on 18 April 1988, the said Teo Soh Lung issued a joint statement, inter alia, denying any involvement in a Marxist conspiracy.
>
> And whereas the Minister for Home Affairs is satisfied that in view of the statement it is necessary in the public interest that the direction dated 26 September 1987 should be revoked.
>
> Now therefore, the Minister for Home Affairs in exercise of the powers conferred on him by s 10 of the said Act hereby revokes the direction dated 26 September 1987, with effect from 19 April 1988.
>
> Made 19 April 1988
>
> Sgd: BG (Res) Tan Chin Tiong
> Permanent Secretary
> Ministry of Home Affairs
> Singapore

It will be seen that the Minister had stated that in view of the statement 'it (was) necessary in the public interest' that the suspension direction should be revoked. There was therefore no suggestion that the applicant had breached any of the conditions attached to the suspension direction.

On 18 June 1988, the applicant's original detention was extended for one year from that day pursuant to powers contained in s 8(2) of the Act which provides as follows:

> The President may direct that the period of any order made under subsection (1) be extended for a further period or periods not exceeding two years at a time.

I come now to consider the judicial reviewability of decisions made by the Cabinet or the Minister under ss 8 and 10 of the Act. Such a consideration also requires references to certain other relevant provisions in the Constitution and the Act in addition to ss 8 and 10 of the Act.

Article 149(1) of the Constitution reads:

> If an Act recites that action has been taken or threatened by any substantial body of persons, whether inside or outside Singapore –
> (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

(b) to excite disaffection against the President or the government;
(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence;
(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
(e) which is prejudicial to the security of Singapore,
any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with articles 9, 13 or 14, or would, apart from this article, be outside the legislative power of Parliament.

Article 151 sets out the restrictions on preventive detention. Article 151 reads:

(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention –

(a) the authority on whose order any person is detained under that law or ordinance shall as soon as may be, inform him of the grounds for his detention and, subject to clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be; and
(b) no citizen of Singapore shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the President.

(2) An advisory board constituted for the purposes of this article shall consist of a chairman, who shall be appointed by the President and who shall be or have been, or be qualified to be, a Judge of the Supreme Court, and two other members, who shall be appointed by the President after consultation with the Chief Justice.

(3) This article does not require any authority to disclose facts the disclosure of which would, in its opinion, be against the national interest.

It is noteworthy that (a) neither art 151(3) of the Constitution nor s 16 of the Act may be invoked by any authority including the Minister to refuse to disclose the 'grounds' for a person's detention in contrast to the disclosure of 'facts' which may be withheld on grounds of national interest; and (b) it is for the authority or the Minister, whenever national interest dictates, to invoke the relevant article or section against any disclosure of any fact and it will be necessary to depose to any such invocation if an arrest or detention is challenged in a court of law.

Counsel for the applicant submitted that this court should objectively examine the evidence for the grounds purportedly justifying the Cabinet's or the Minister's 'satisfaction' to decide whether the precedent facts to exercise the power of detention exist. He further submitted that once an applicant for a writ of habeas corpus has established a prima facie case that the detention is unlawful the burden is cast upon the detaining authority to prove its legality by the evidence it has at its disposal. In this regard, he contended that:

(a) *Liversidge* v *Anderson*[1] is no longer good law in view of the decisions of the House of Lords in *R* v *Inland Revenue Commissioner, ex p Rossminster Ltd*,[2] *R* v *Home Secretary, ex p Khawaja*[3] and *R* v *Home Secretary, ex p Bugdaycay*;[4]
(b) the courts of Singapore and Malaysia were in error in deciding, as he claimed, that in national security cases the burden of proof lies upon the applicant throughout and that the executive is the sole judge of what national security requires in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*,[5] *Theresa Lim Chin Chin & Ors* v *Inspector General of Police* [6] and *Lee Mau Seng* v *Minister for Home Affairs, Singapore & Anor*;[7] and
(c) this court should order the release of the applicant if upon an objective examination of the grounds purportedly justifying the detention this court decides that the precedent facts do not exist. I was referred to *Minister of Home Affairs* v *Austin*,[8] *Hurley & Anor* v *Minister of Law & Order*,[9] *Katofa* v *Administrator-General for South West Africa & Anor*,[10] on which counsel for the applicant placed great reliance and which relied on *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [11] and *Council of Civil Service Unions & Ors* v *Minister for the Civil Service* [12] (hereinafter referred to as 'the *GCHQ*' case as it is popularly known) which was recently applied by Taylor J in *R* v *Home Secretary, ex p Ruddock*.[13]

Accordingly, I have to re-examine the question whether or not the subjective determination of the Cabinet or the Minister under ss 8 and 10 of the Act, which in explicit statutory terms confer on them the discretionary powers of ordering preventive detention, is justiciable. By way of a preface, it seems to me of vital importance to appreciate what is entailed in the concept of justiciability. A matter is justiciable in a court of law if it is within the jurisdiction or function of a court of law to make a decision or a number of decisions upon the matter properly before it. Of foremost importance are the terms of the statutory provisions such as ss 8 and 10 of the Act, the constitutional validity of which is not challenged. They are part of the constitutional foundation upon which our country has been and is to be governed, and a clear definition of the ambit of executive discretionary powers and the scope of judicial powers is vitally necessary. It also seems to me that underlying this concept of justiciability are broadly two elements which must be borne clearly in mind. First is the nature of the decision which is challenged either by habeas corpus proceedings under s 3 of the Habeas Corpus Act 1816 or in a judicial review. If such decisions pertain wholly or substantially to facts, which have been described variously as 'jurisdictional precedent facts' or 'objective facts', such decisions may be adjudicated upon by a court of law subject to the

limits of the supervisory function of a court of law. On the other hand, the decision under challenge may involve questions of policy, judgment or requirements of national security which the law, such as ss 8 and 10 of the Act, may have expressly left to the discretion of a designated authority. Whilst a court of law must be vigilant to ensure that there is no unlawful exercise of discretionary powers which affect the liberty of persons, a court of law must be equally punctilious in giving effect to legislation, in not behaving as though it is a court of appeal and must not determine, as appellate courts do, whether the decision under challenge is right or wrong for the simple but compelling reason that that decision has been statutorily left to an authority other than a court of law. The second element in the concept of justiciability, which is closely linked to the nature of a decision under challenge, concerns the fundamental basis and nature of the function of a court of law in habeas corpus proceedings or judicial review. A correct perception of the true basis and nature of judicial review will ensure that a court of law will properly keep within the limits of judicial review over a decision-making process to ensure that there has been no unlawfulness in the decision-making process and will also prevent a court from becoming an appellate court and thereby wrongly deciding whether a decision is right or wrong or in either affirming or substituting its decision for the decision of the authority vested with the discretionary power.

Having set out the legal features which would help identify the limits of judicial review, I should now say something about the scope of judicial review. Judicial review is concerned with the legality of any aspect or any decision made in the exercise of executive discretionary powers. In looking at any such aspect or any such decision, courts do not look at the merits of the decision. They do not ask whether the decision is 'right or wrong' because that decision has been entrusted to another authority. In a judicial review, courts should only ask whether a decision made in the exercise of an executive discretionary power is 'lawful or unlawful'. The scope of judicial review has recently been exhaustively dealt with in the *GCHQ* case[12] under the well-known but perhaps non-exhaustive heads of (a) illegality, (b) irrationality, and (c) procedural impropriety. These are strict legal concepts. They are essential to make sure that there is no unlawfulness. Recognizing that the subjective determination of a Minister is not justiciable or deciding that a court should not substitute its decision for that of a Minister therefore does not mean judicial abdication. I should hope to have demonstrated by the end of this judgment that under our laws our courts are empowered to and are indeed obliged in the appropriate case to exercise supervisory jurisdiction over the exercise of executive discretionary powers.

With these prefatory remarks, I turn to consider the authorities cited and the submissions made by counsel for both parties. In *Liversidge* v *Anderson*,[1] the appellant, who was detained by an order made by the respondent as the Home Secretary under reg 18B of the Defence (General) Regulations 1939, sought a declaration that his detention was unlawful. As the detention order merely recited that the respondent had reasonable grounds to believe the appellant to be a person of hostile associations and that by reason of such hostile associations it was necessary to exercise control and detain him, the appellant applied for particulars of the grounds of the respondent's belief as to the appellant's hostile associations and as to the necessity of detention. The good faith of the respondent was not impugned. The appellant's application was refused. By a majority, the House of Lords (with Lord Atkin dissenting) held that a court of law could not inquire whether in fact the respondent had reasonable grounds for his belief and that the matter was one for the executive discretion of the respondent. I need not recite the well-known dissent of Lord Atkin.

In the companion case of *Greene* v *Secretary of State for Home Affairs*,[14] the same majority of the House of Lords held that the Home Secretary's order, the authenticity and good faith of which were not impugned, constituted a complete answer to an application by Greene for a writ of habeas corpus and that no affidavit by the Home Secretary justifying his cause of belief was necessary. Lord Atkin concurred in dismissing Greene's appeal but he said in *Liversidge* v *Anderson*[1] at p 246 that in *Greene's* case 'the circumstances were not the same'. I think I shall have to set out 'the circumstances' in *Greene's* case as such a narrative would, in my opinion, demonstrate that (a) there are several factual parallels in material respects between *Greene's* case and the instant case; (b) Lord Atkin did not look behind the credible evidence such as there were produced by the Home Secretaries; and (c) Lord Atkin did not as he could not prefer the evidence of Greene. In my view, Lord Atkin in firmly setting his face, some would say somewhat trenchantly, against accepting any ipse dixit (mere assertions) of the executive in a matter concerning the liberty of the subject, also recognized, quite properly, the bounds of judicial intervention.

On 24 May 1940, Greene was detained pursuant to a detention order made by the then Home Secretary pursuant to powers conferred on him by reg 18B. On 26 March 1941, Greene applied for a writ of habeas corpus. In support of his application he denied in an affidavit any hostile associations at any time. Sir John Anderson, the then Home Secretary, swore an affidavit which stated, so far as is material, as follows:

> (3) Before I made the said order I received reports and information from persons in responsible positions who are

experienced in investigating matters of this kind and whose duty it is to make such investigations and to report the same to me confidentially. I carefully studied the reports and considered the information and I came to the conclusion that there was clear cause to believe, and I did in fact believe, that Benjamin Greene was a person of hostile associations and that by reason thereof it was necessary to exercise control over him.

(4) A copy of the detention order was sent by me to the advisory committee appointed under reg 18B ... The advisory committee duly reported to me. After again considering all the information about the case, including the committee's report, I was confirmed in my belief that Mr Greene was a person of hostile associations and that by reason thereof it was necessary to exercise control over him.

Sir John Anderson's successor, Mr Herbert Morrison, also swore an affidavit in the following terms, which were quite general in tenor:

I have read a copy of the affidavit of Sir John Anderson ... and I desire only to add that I have satisfied myself that the said Benjamin Greene was and is a person of hostile associations, and that by reason thereof it is necessary to exercise control over him.

In a further affidavit affirmed on 24 April 1941, Greene stated as follows:

I deny that there is a clear cause to believe, or that the said Sir John Anderson does in fact believe that I am a person of such hostile associations that it is necessary to exercise control over me. The said Sir John Anderson gives no information to the court of the names of the 'persons in responsible positions' and I say this is not evidence that this honourable court can accept. I crave that this honourable court will insist on its right to have before it the evidence the said Sir John Anderson purported to act upon ... The procedure before the advisory committee was such that I had no means of giving any explanations of the alleged facts upon which any reasonable grounds of belief could be based ... At no time was I given information as to which particular activities or associations were relied upon to constitute the said grounds (of detention). I say, therefore, that even after the hearing before the advisory committee the Secretary of State had not, and could not have had, reasonable grounds to believe anything which warranted my continued detention. I have read what purports to be a copy of the affidavit of Mr Herbert Morrison ... It is untrue to say that he has satisfied himself that I am a person of hostile associations. My original detention and its continuance have every appearance of being due to political animosities, and are in the nature of political persecution.

Although it should be noted that the Home Secretary had claimed privilege as regards the information of trustworthy informants, Lord Atkin concluded that on the hardly conclusive material before him the Home Secretary had proved that he had reasonable cause for his belief.

It was submitted by counsel for the applicant, however, that *Liversidge* v *Anderson*[1] had cast its long shadows on a number of Malaysian and Singapore decisions which, as regards the burden of proof, are arguably at variance with the House of Lords' decision in the case of *Khawaja*.[3] In *Karam Singh*[5] he was detained under Malaysian preventive detention legislation similar in all material respects to those relevant in the instant case. Under the 'grounds' on which the detention order was made, it was stated that he had knowingly and willingly participated in activities which had furthered the cause of the Malayan Communist Party of Malaya; that he had promoted pro-Communist activities; and that he had during the Indonesian Confrontation of Malaysia assisted persons who were out to overthrow the lawful government by illegal and violent means. Several allegations of fact were asserted against him. In support of his application for habeas corpus, he denied the alleged grounds, denied that he was a Communist or pro-Communist and under oath affirmed that some of his alleged pro-Communist activities were undertaken as legal counsel and that, so far as the allegations of facts could have founded prosecutions in criminal courts in the normal way, there was mala fides for the detaining authorities to have instead invoked the law of preventive detention without trial.

In a judgment delivered on 25 April 1969, the then Federal Court of Malaysia dismissed the appeal of Karam Singh who had failed in the High Court.

Azmi LP stated at p 138 as regards the burden of proof as follows:

I will first deal with the question of burden of proof. In my view, the passage from *Basu* cited by the learned judge correctly expresses the law as to burden of proof, namely, that it is for the authority who has detained the detainee to show that the latter has been detained in exercise of a valid power. Once that is shown it is for the detainee to show that the power has been exercised mala fide or improperly which means that it is made for a 'collateral' or 'ulterior' purpose, ie a purpose other than those set out in art 151, and in this case for a purpose other than for preventing the detainee from doing acts prejudicial to the security of Malaysia.

Suffian FJ (as he then was) relying on *Liversidge* v *Anderson*[1] and *Greene*[14] said at p 152:

In my judgment, the onus of proving the legality of the detention is on the Minister in the first instance. This he can discharge simply by producing the order of detention which, if its authenticity and good faith are not impugned, is a sufficient answer. If the detainee alleges mala fides, as he does here, then the onus shifts to him and it is for him to prove mala fides.

Karam Singh[5] was followed by Salleh Abas LP in *Re Tan Sri Raja Khalid bin Raja Harun*[15] who said at p 186E-H as follows:

Where a person who has been deprived of his liberty challenges the detention it is for the authority to show that the person has been detained in exercise of a valid legal power. Once that is shown it is for the detainee to show that the power had been exercised mala fide or improperly or made for a 'collateral' or 'ulterior' purpose. Section 73(7) states that a person detained pursuant to the powers conferred shall be deemed to be in lawful custody. Thus the burden is immediately shifted to the detainee.

Karam Singh [1969] 2 MLJ 129 laid down the law on s 8 of the Act. Whether or not the facts on which the order of detention is to be based are sufficient or relevant is a matter to be decided solely by the executive.

Counsel for the applicant observed that three cases in Singapore either adopted the approach of *Karam Singh*[5] or were at one with *Karam Singh*[5] so far as the burden of proof is concerned. The cases are *Re Choo Jee Jeng*[16] at p 219; *Re Ong Yew Teck*[17] at p 69A-D and *Lee Mau Seng* v *Minister for Home Affairs, Singapore & Anor*[7] at p 145C-I.

It must be noted that *Karam Singh*[5] and similar Malaysian and Singapore authorities did not accept the ipse dixit of the detaining authorities of the type as asserted by the Home Secretary in *Liversidge* v *Anderson*.[1] Secondly, the 'grounds' on which the relevant detention orders were made and the 'allegation of facts' on which the orders were based, which the respective Ministers were required to furnish the detainees under the relevant legislation, plainly constituted more than the ipse dixit of the Ministers and they approximated more closely the sort of 'evidence' produced in *Greene's* case.[14] Thirdly, the onus of proving mala fides or improper purpose lies with the person alleging it and the burden is a heavy one because it is a very serious allegation: see Suffian FJ (as he then was) in *Karam Singh*[5] at p 157E. It repays reminder that this investigation of the allegation of abuse of power, which is a question of fact may, on a proper analysis, be subsumed under the head of 'illegality' as defined by Lord Diplock in the *GCHQ* case[12] at p 410E-F.

But then counsel for the applicant contended that the law is different and that it was laid down in *Khawaja's* case[3] that in a challenge against a detention it is for an applicant to establish a prima facie case sufficient to raise an issue concerning the legality of the detention and that, if this is done, it is for the detaining authority to show its legality by whatever evidence it has at its disposal.

In *Khawaja*,[3] an entrant into the United Kingdom who had obtained leave to enter by fraud is an illegal immigrant and might be detained and removed from the United Kingdom by an immigration officer or the Secretary of State pursuant to powers conferred by paras 9, 10 and 16 of Schedule 2 of the United Kingdom Immigration Act 1971. Judicial review was undertaken by treating the status of the immigrant as a 'jurisdictional fact' so that it could be seen if the order for detention and removal was lawful. It will be appreciated, however, that the nature of the issue for decision was one of fact which could be easily resolved by the judicial process receiving and evaluating usually by affidavit and, if necessary at the discretion of the court, oral evidence. Here, it was clear that Parliament would not have countenanced the detention and expulsion of any immigrant who was not an 'illegal immigrant' as defined by them. The instant case is quintessentially different; it involves the exercise of discretionary powers which the Constitution and the Act have conferred on the Cabinet or the Minister in respect of national security which indisputably concerns issues and considerations of security hardly amenable to the judicial process of adjudication.

The essential difference I referred to is markedly recognized by the House of Lords in the *GCHQ* case[12] and *Ruddock's* case[13] to which I will revert after I have considered *Katofa's* case[10] upon which counsel for the applicant had placed great reliance. As *Katofa's* case[10] was the most persuasive authority relied upon, I shall not lengthen this judgment by a consideration of *Austin's* case[8] or *Hurley's* case.[9] In *Katofa's* case[10] the Supreme Court of South West Africa decided, according to counsel for the applicant, that in a preventive detention ordered under legislation which was also subjectively worded, objective reasonable grounds had to exist to found the satisfaction of the Administrator-General who was obliged to disclose the reasons of the detention to the Supreme Court to justify the detention. In so far as *Katofa*[10] enjoins a court to exercise a supervisory function over the lawfulness of a detention, I find it unexceptional. But if, as was canvassed by counsel for the applicant, it purports to require a court to look behind the allegations of fact furnished and, further, to decide whether they are in fact true in the light of the allegations of a detainee, then, with respect, it has gone too far. Those appearing for the respondents in the instant case submitted that *Katofa's* case[10] is distinguishable. First, they pointed out that the terms of ss 2(1)(a) and (b) of the Proc. AG 26 of 1978, in contrast with ss 8 and 10 of the Act under consideration, are more specific and therefore more susceptible to a judicial inquiry. Secondly, the ipse dixit in that case consisted of a bald statement that the Administrator-General had in his possession and under his control all the documents concerning the detainee in the case and that he was satisfied in terms of the relevant provisions. No reasons were given nor was any information given as to what had induced the Administrator-General to issue the warrant. I accept these distinctions as valid and I decline to follow *Katofa's* case.[10]

I now return to the famous *GCHQ* case.[12] In that case the Minister for the Civil Service in the exercise of royal prerogative powers ordered that employees of the United Kingdom Government's Communication Centres at Cheltenham could not be members of trade unions. The unions had not been consulted and it was alleged and accepted that there was a breach of natural justice or the principle of legitimate expectation. However, the Crown asserted that there was a real risk that any prior consultation with the trade unions might itself have provoked a

strike which would have caused harm to vital communications and seriously affected the national defence of the United Kingdom. The House of Lords held that the exercise of royal prerogative was just as amenable to judicial review as the exercise of a statutory power. But in that case the House of Lords did not go behind nor question the assertions of the Crown as they were credible and held that the needs of national defence must override natural justice.

With regard to the scope of judicial review, Lord Roskill said at p 414C-D to 415B-C as follows:

> Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described – by no means critically – as an upsurge of judicial activism ... This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, Wednesbury principles (*Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'. As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.
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> My noble and learned friend, Lord Diplock, in his speech has devised a new nomenclature for each of these three grounds, calling them respectively 'illegality', 'irrationality' and 'procedural impropriety' – words which, I may respectfully say so, have the great advantages of making clear the differences between each ground.

Where national security is involved, Lord Roskill said at p 420D-G as follows:

> My Lords, the conflict between private rights and the rights of the state is not novel either in our political history or in our courts. Historically, at least since 1688, the courts have sought to present a barrier to inordinate claims by the executive. But they have also been obliged to recognize that in some fields that barrier must be lowered and that on occasions, albeit with reluctance, the courts must accept that the claims of executive power must take precedence over those of the individual. One such field is that of national security. The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds. That that principle exists is I think beyond doubt. In a famous passage in *The Zamora* [1916] 2 AC 77 at p 107, Lord Parker of Waddington, delivering the opinion of the Judicial Committee, said:
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> 'Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such mattes should be made the subject of evidence in a court of law or otherwise discussed in public.'

I now turn to the practical but vital question as to how this court should approach the disclosures of the respondents of its case against the applicant and the applicant's claims of innocence and abuse of power by the executive. Lord Scarman's speech in the *GCHQ* case[12] at p 404F-H is most instructive:

> The question can take one of several forms. It may be a question of fact which Parliament has left to the court to determine ... or may arise for consideration as a factor in the exercise of an executive discretionary power. But, however it arises, it is a matter to be considered by the court in the circumstances and context of the case. Though there are limits dictated by law and common sense which the court must observe in dealing with the question, the court does not abdicate its judicial function. If the question arises as a matter of fact, the court requires evidence to be given. If it arises as a factor to be considered in reviewing the exercise of a discretionary power, evidence is also needed so that the court may determine whether it should intervene to correct excess or abuse of the power.

At pp 406-407A, Lord Scarman elaborated further as follows:

> ... where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence ... *Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held. There is no abdication of the judicial function, but there is a common sense limitation recognized by the judges as to what is justiciable*; and the limitation is entirely consistent with the general development of the modern case law of judicial review. (emphasis added)

Lord Fraser also stated at p 402C-D as follows:

> The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if

the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the government is under an obligation to produce evidence that the decision was in fact based on grounds of national security.

These judicial pronouncements, in my view, confirm that in the absence of abuse of power or irrationality, which have to be proved, courts have always recognized the common sense limitation as to what is justiciable and will accept the executive's assessment as to any national security requirement. Thus, in *Ruddock's* case[13] one of the three applicants claimed damages against the Home Secretary for abuse of his public office in allegedly wire-tapping him contrary to certain published criteria regulating the issue of a warrant authorizing wire-tapping. For the Home Secretary, it was merely asserted that the criteria were always followed and that, for security reasons, it was his policy neither to deny or confirm the existence of any warrant. Taylor J did not look behind the assertions and accepted these assertions as a sufficient answer against the complaint of an abuse of power.

In *Kevin Desmond De Souza & Ors* v *Minister of Home Affairs & Ors*[18] I had occasion to consider the questions of law which I have again re-examined. In that case, I set out four propositions which courts of law must give effect to when reviewing cases of preventive detention under the Act. Propositions 1, 2 and 4 and the first part of proposition 3 reflect, in my view, limits of judicial review under the supervisory and not the appellate jurisdiction of the courts and, in cases involving national security, they reflect the common sense approach as enunciated in the *GCHQ* case[12] and the example of application in *Ruddock's* case.[13] The second part of proposition 3 sets out the head of judicial review so that courts can remedy any unlawfulness in the exercise of discretionary powers. The juridical basis why courts must intervene is because it is beyond dispute that both our Constitution and our Parliament would not countenance any unlawful exercise of any powers, both discretionary and statutory. Having reviewed once again the relevant case law, I re-affirm the four propositions set out in *Kevin De Souza's* case.[18]

The applicant also contended that her detention and the extension of the detention order were an abuse of power and that the decisions made under ss 8 and 10 of the Act should be struck down because they were illegal, irrational and out of proportion to what she had allegedly done. These submissions require further references to the facts. BG Tan Chin Tiong, Permanent Secretary to the Minister of Home Affairs, in his affidavit recited the background and the executive's belief in addressing security threats timeously. The press statement of 20 April 1988 stated thus:

> ISD had monitored the principal persons, Tan Wah Piow and Vincent Cheng, since the early 1970s. In June 1986, ISD had apprised the government of the activities of Vincent Cheng and a group of radicals operating under the cover of the Catholic Church. The government took a serious view of such undesirable activities.
>
> PM registered concern when Pope was in Singapore.
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> On 9 July 1986, the Minister of Home Affairs warned the Archbishop, Monsignor Gregory Yong, about the problem. Despite this, Vincent Cheng and the others continued with their radical activities. Therefore, when the Pope visited Singapore on 20 Nov 1986, the Prime Minister took it upon himself to register his concern with the Pope in the presence of Archbishop Yong.
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> The government only decided to launch the May 1987 operation after careful deliberation. It could have allowed the Marxist conspiracy to fester and grow, in order to watch where it would lead, but decided it would be safer to nip the conspiracy in the bud.

The press statement of the Minister of Home Affairs gave a detailed account of the Marxist conspiracy, the links between Tan Wah Piow and Paul Lim Huat Chye who, on the applicant's initial admission which she later sought to retract, had suggested that she and her friends 'help the opposition'. One other key figure in the conspiracy network was one Vincent Cheng, a self-confessed Marxist who had been in contact with Philippino communists. He admitted that he was instructed to infiltrate legitimate organizations in Singapore to confront the government of Singapore and the stratagem was to start with peaceful protests and mass meetings (and in his own words) 'leading to public disorder and maybe even rioting, bloodshed and violence'. It is the case of the ISD that the applicant was part of the network. The press statement has to be fully and carefully read.

But then it was contended by counsel for the applicant that since she was released as no longer posing any security threat, it is illogical to believe that in making the joint press statement, which was merely a repetition of her representations to the advisory board, she would more likely resume her former activities. It was further argued that the extension of the detention order for another year was out of all proportion to what she had said in the joint press statement.

As I had said in *Kevin De Souza's* case,[18] the security implications arising out of the issue of the joint press statement were for the executive to decide. In this connection, the government said: 'The detainees now claim that everything they did was legal and legitimate. When they claim, or worse, if they truly believe, that they have done nothing wrong, there is every likelihood that they will resume their former activities.' The likelihood, extent and duration of the risk are par excellence the kind and type of decisions which case law says must be left to the professionals in the ISD and the executive who are responsible for national security.

The contentions of counsel for the applicant of illegality or irrationality can only be made good if the applicant's assertions are all true. Are they? That question

must be left to the subjective satisfaction of the Cabinet and the Minister if there is, as I find in this case, credible evidence or material similar in nature to those accepted by Lord Atkin in *Greene's* case,[14] the House of Lords in the *GCHQ* case[12] and Taylor J in *Ruddock's* case.[13]

Finally, I turn to the submission that if the detention of the applicant was lawful it had become unlawful as the nature and conditions of imprisonment had fallen below minimum standards of treatment and I was referred to *Middleweek* v *Chief Constable of Merseyside*,[19] per Ackner LJ (as he then was) and *R* v *Secretary of State for the Home Department, ex p Herbage (No 2)*.[20]

The conditions of imprisonment were described by Lim Chin Ow, the officer-in-charge of the detention centre. He affirmed that the cell measures 6.64 sq metres, 20% larger than the basic requirement listed by the American Correctional Association. I was told that the room is spartan but clean and that the applicant was issued with mattress, bedsheet, 'Dunlopillo' (foam) pillow, pillow case, blanket, tooth brush, toothpaste and other necessities. The applicant, like the other detainees, is allowed twenty minutes exercise once in the morning and once in the afternoon daily. In addition, she has been taken out of her room three to six times a week for periods ranging from 50 minutes to 2½ hours on each occasion to an air-conditioned room where she could read and she was provided with light refreshment. She has been given food in accordance with the prescribed diet scales, medical treatment, correspondence and visits under the Internal Security (Detained Persons) Rules 1960. Moreover, the Board of Inspection comprising Justices of the Peace has inspected the detention centre once a month. The applicant had requested that the flourescent light in the room be switched off after midnight but the prison authorities said that the room had to be kept lit so that the guard could monitor the detainee's well-being. It was suggested that she could use an eyeshade.

I find that the conditions of imprisonment have complied with the detention rules and there is no question that the nature and conditions of imprisonment had fallen below minimum standards.

The application is accordingly dismissed with costs.

Order accordingly.

Solicitors: *Teo Lai & Lee.*

Reported by *Wong Kim Fatt*

Arab Bank Ltd v Ng Soo Jin & Ors (Bank of Montreal, Third Party)

HIGH COURT (SINGAPORE) – SUIT NO 1134/85
CHAO HICK TIN JC
27 JULY 1988

Civil Procedure – Charging order against second defendant's property after judgment – Property mortgaged to appellant – Service of bankruptcy notice on second defendant after order nisi – Second defendant committed act of bankruptcy one day after order absolute – Affidavit stating second defendant 'probably insolvent' – Whether assistant registrar should have made the order absolute – Appeal to set aside charging order – Whether full and frank disclosure by plaintiffs – Rules of the Supreme Court 1970, O 49, O 50 r 1(4), (6)

Bankruptcy – Second defendant as purchaser of property served with bankruptcy notice – Act of bankruptcy committed one day after charging order made absolute – Priority – Whether inequitable to make order absolute – Bankruptcy Act (Cap 20, 1985 Ed), s 49

On 29 April 1985, the plaintiffs obtained a judgment against the second defendant for $3,184,070.81 with interest. They then applied for a charging order in respect of the property known as Blk 119, Sunset Way, 06-01, Singapore ('the property'), of which the second defendant (Goh Yoke Hian) was the purchaser. The property was mortgaged to Singapore Finance Ltd ('the appellant'), but it was erroneously stated in the affidavit of one Lai Mun Kwan in support of the application that it was mortgaged to the Development Bank of Singapore and DBS Finance Ltd.

After the making of the order nisi on 25 July 1985, but before it was made absolute, the third party (Bank of Montreal, a creditor of the second defendant) intervened. In an affidavit filed on behalf of the third party, the court was informed that the third party had obtained a judgment against the second defendant on 5 August 1985 in Suit No 2089/1985 for $2 million, plus interest and costs. The third party believed that the second defendant was 'probably insolvent'. An order absolute was made on 30 August 1985 in favour of both the plaintiffs and the third party. On 23 August 1985, the plaintiffs served a bankruptcy notice on the second defendant. As no payment was made pursuant to the notice, the second defendant committed an act of bankruptcy on 31 August 1985, a day after the making of the order absolute. The second defendant was made a bankrupt on 17 October 1986.

At the time of the making of the order absolute, a caveat had already been lodged at the Land Titles Registry by the appellant on 3 April 1981. On 10 October and 20 November 1985, the plaintiffs and the third party respectively lodged their caveats pursuant to the charging order. Owing to an oversight, the appellant allowed its caveat to lapse. However, it filed a fresh caveat on 3 September 1986. On 29 December 1986, the appellant applied by summons-in-chambers to be added as a party and to set aside or vary the charging order obtained by the plaintiffs and the third party. The application to set aside or vary the charging order was refused by the assistant registrar. The appellant appeals against the refusal of the assistant registrar to set aside or vary the charging order on six main grounds.

Held, dismissing the appeal: (1) Nothing in O 50 r 1 of the Rules of the Supreme Court 1970 requires that the particulars